

ITEM 9

PROPOSED ORDER TO SET ASIDE CONSOLIDATED PARAMETERS AND GUIDELINES

Open Meetings Act (CSM 4257)

Government Code Sections 54954.2, 54954.3
Statutes 1986, Chapter 641

Brown Act Reform (CSM 4469)

Government Code Sections 54952, 54954.2, 54957.1, and 54957.7
Statutes 1993, Chapters 1136, 1137, and 1138; Statutes 1994, Chapter 32

Directed by Statutes 2005, Chapter 72, Section 17
(Assem. Bill No. 138 (“AB 138”))

Executive Summary

AB 138 requires the Commission on State Mandates (Commission) to set aside the Statements of Decision in the *Open Meetings Act* (CSM 4257) and *Brown Act Reform* (CSM 4469) test claims, and to “set aside” the “reconsiderations” on these programs. Item 6 addresses the Statements of Decision on these programs.

AB 138 also requires the Commission to “amend the appropriate parameters and guidelines” for the *Open Meetings Act* and *Brown Act Reform* programs “to be consistent” with this bill. This item addresses the consolidated parameters and guidelines for these programs in light of the requirements of AB 138. For the reasons provided below, staff recommends that the Commission set aside the parameters and guidelines, effective July 19, 2005. The proposed order is in Exhibit A.

Background

In 1988, the Commission adopted a Statement of Decision in the *Open Meetings Act* test claim (CSM 4257). The Commission’s parameters and guidelines for the *Open Meetings Act* program authorized reimbursement for the increased costs to prepare and post a notice and an agenda containing a brief general description of each item of business to be transacted or discussed at least 72 hours before the meeting of the local legislative body. For purposes of seeking reimbursement for the *Open Meetings Act* program, “legislative body” was defined in former Government Code sections 54952 and 54952.2 to include the governing body of a local agency, permanent decision-making committees or boards created by formal action of the governing body, and temporary decision-making committees or boards created by formal action of the governing body.

In 2001, the Commission adopted a Statement of Decision in the *Brown Act Reform* test claim (CSM 4469). The *Brown Act Reform* test claim addressed the 1993 and 1994 amendments to the

Brown Act. The Commission found that the test claim legislation constituted a reimbursable state-mandated program by:

- Adding two new “legislative bodies” required to comply with the provisions of the Brown Act;
- Requiring certain advisory bodies to comply with the full notice and agenda requirements of the Brown Act by preparing and posting, at least 72 hours before the meeting, a notice and agenda that contained a brief general description, generally not to exceed 20 words, of each item of business to be transacted or discussed at the meeting of the advisory body; and
- Requiring all legislative bodies defined in the Brown Act to comply with public disclosure and reporting requirements for closed session meetings.

In 2002, the Commission adopted the parameters and guidelines for *Brown Act Reform*, with a reimbursement period beginning January 1, 1994. The parameters and guidelines were consolidated with the parameters and guidelines for the *Open Meetings Act* program (CSM 4257) for annual reimbursement claims filed for the 2001-2002 fiscal year and thereafter.¹

Assembly Bill 138 (Exhibit B)

AB 138 became effective and operative on July 19, 2005, and does three things that are relevant to the parameters and guidelines for these programs. First, AB 138 amended Government Code section 17556, subdivision (f), to read as follows:

The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:

... (f) The statute or executive order imposes duties that are necessary to implement, reasonably within the scope of, or expressly included in a ballot measure approved by the voters in a statewide or local election. This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters....

Second, AB 138 repealed and replaced two statutes within the Brown Act, Government Code sections 54954.2 and 54957.1, and added language that the statutes are necessary to implement and are reasonably within the scope of Proposition 59. As more fully discussed below, Proposition 59 was enacted by the voters in the November 2004 election to amend the Constitution to require that meetings of public bodies be open to the public. Section 16 of AB 138 states the following:

The Legislature finds and declares that Sections 54954.2 and 54957.1 of the Government Code are necessary to implement and reasonably within the scope of paragraph (1) of subdivision (b) of Section 3 of Article I of the California Constitution.

¹ The parameters and guidelines are attached to the proposed order in Exhibit A.

Third, AB 138 requires the Commission to “amend the appropriate parameters and guidelines” for the *Open Meetings Act* and *Brown Act Reform* programs “to be consistent” with this bill. Section 17 of AB 138 states the following:

Notwithstanding any other provision of law, the Commission on State Mandates shall set-aside all decisions, reconsiderations, and parameters and guidelines on the Open Meetings Act (CSM 4257) and Brown Act Reform (CSM 4469) test claims. The operative date of these actions shall be the effective date of this act. In addition, the Commission on State Mandates shall amend the appropriate parameters and guidelines, and the Controller shall revise the appropriate reimbursement claiming instructions, as necessary to be consistent with any other provisions of this act.

Discussion

Article XIII B, section 6 of the California Constitution requires reimbursement only when the Legislature or any state agency mandates a new program or higher level of service that results in increased costs mandated by the state. Reimbursement under the Constitution is not required when duties are imposed by the voters. In addition, Government Code section 17556, subdivision (f), as amended by AB 138, prohibits the Commission from finding “costs mandated by the state” when:

The statute or executive order imposes duties that are *necessary to implement, reasonably within the scope of*, or expressly included in the ballot measure approved by the voters in a statewide or local election. *This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.* (Emphasis added.)

Thus, reimbursement is not required under Government Code section 17556, subdivision (f), when a test claim statute imposes duties that are necessary to implement, are reasonably within the scope of, or are expressly included in a ballot measure approved by the voters either before or after the enactment of the test claim statute. Government Code section 17556, subdivision (f), as amended by AB 138, is a duly enacted statute and must be presumed constitutionally valid.²

In November 2004, the voters amended article I, section 3 of the California Constitution through the adoption of Proposition 59. Proposition 59 adds to the Constitution the requirement that meetings of public bodies and writings of public officials and agencies be open to the public. Proposition 59 adds the following relevant language to the Constitution:

(b)(1) The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings

² *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 129. (Exhibit C.)

demonstrating the interest protected by the limitation and the need for protecting that interest.

(3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

(4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provision in Section 7.

(5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.

(6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses provided in Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions; nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses.

The ballot materials given to the electorate on Proposition 59 state that: “The measure does not directly require any specific information to be made available to the public. It does, however, create a constitutional right for the public to access government information.”³ Thus, the test claim statutes in the *Open Meetings Act* and *Brown Act Reform* programs do not impose duties that are “expressly included” in the ballot measure. Nevertheless, staff finds that the exception to reimbursement found in Government Code section 17556, subdivision (f), applies since the test claim statutes are “necessary to implement” and are “reasonably within the scope of” Proposition 59.

The purpose of Proposition 59 is expressly stated as follows: “The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.” (Cal. Const., art. 1, § 3, subd. (b)(1).) To implement the voter’s intent, Proposition 59 acknowledges the existing open meetings statutes and requires that the existing

³ See, Ballot Pamphlet, Statewide General Election (Nov. 2, 2004) Proposition 59, analysis by the Legislative Analyst. (Exhibit D.) The courts frequently look to ballot materials in order to understand the terms of a measure enacted by the electorate. (*County of Fresno v. State of California* (1990) 53 Cal.3d 482, 287; *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 737.)

statutes be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. (Cal. Const., art. 1, § 3, subd. (b)(2).) The Brown Act is specifically identified in the ballot materials provided to the voters as existing law governing the open meetings for local legislative bodies.⁴

The purpose of the Brown Act, as declared by the Legislature in 1953, is similar to the purpose of Proposition 59. Government Code section 54950 provides that:

In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

The test claim statutes further this purpose by requiring the following activities that are listed in the parameters and guidelines:

- Prepare a single agenda for a regular meeting of a legislative body of a local agency or school district containing a brief description of each item of business to be transacted or discussed at a regular meeting, including items to be discussed in closed session, and citing the time and location of the regular meeting. (Gov. Code, § 54954.2.)
- Post a single agenda 72 hours before a meeting in a location freely accessible to the public. Further, every agenda must state that there is an opportunity for members of the public to comment on matters that are within the subject matter jurisdiction of the legislative body, subject to exceptions stated therein. (Gov. Code, §§ 54954.2, 54954.3.)
- Disclose in an open meeting, prior to holding any closed session, each item to be discussed in the closed session. (Gov. Code, § 54957.7.)
- Reconvene in open session prior to adjournment to make any disclosures required by Government Code Section 54957.1 of action taken in the closed session. (Gov. Code, §§ 54957.1, 54957.7.)

Since the purpose of the Brown Act and the purpose of Proposition 59 are to ensure that the people have the right of access to information concerning the conduct of the people's business, staff finds that the activities identified in the parameters and guidelines are necessary to implement and are reasonably within the scope of Proposition 59. Moreover, the Legislature expressly declared, when enacting AB 138 in July 2005, that Government Code sections 54954.2 and 54957.1 "are necessary to implement and reasonably within the scope of paragraph (1) of subdivision (b) of Section 3 of Article I of the California Constitution." (AB 138, § 16.)

Therefore, staff finds that Government Code section 17556, subdivision (f), applies to the *Open Meetings Act* and *Brown Act Reform* programs and, thus, the activities listed in the parameters and guidelines are no longer reimbursable. AB 138 became operative and effective on July 19, 2005. Section 17 of the bill, when directing the Commission to set aside the *Open Meetings Act* and *Brown Act Reform* decisions, states that "the operative date of these actions shall be the effective date of this act." Thus, staff concludes that the parameters and guidelines for this program should be set aside, effective July 19, 2005.

⁴ *Id.*

Staff Recommendation

Staff recommends that the Commission adopt the proposed order to set aside the consolidated parameters and guidelines in *Open Meetings Act* (CSM 4257) and *Brown Act Reform* (CSM 4469), effective July 19, 2005.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIMS ON:

Government Code sections 54952, 54954.2, 54954.3, 54957.1, and 54957.7 as amended by Statutes 1986, Chapter 641, and Statutes 1993, Chapters 1136, 1137, 1138

Filed on April 1, 1987

By the County of Los Angeles, Claimant
(*Open Meetings Act*, CSM 4257)

Filed on December 29, 1994 and amended on August 7, 2000;

By the City of Newport Beach, Claimant.
(*Brown Act Reform*, CSM 4469)

No. 04-PGA- 33 (a.k.a. CSM 4257 and 4469)

Open Meetings Act and Brown Act Reform

**PROPOSED ORDER TO SET ASIDE
CONSOLIDATED PARAMETERS
AND GUIDELINES**

(Statutes 2005, Chapter 72, Section 17
(Assem. Bill No. 138 (“AB 138”))

Proposed for Adoption on September 27, 2005

ORDER TO SET ASIDE CONSOLIDATED PARAMETERS AND GUIDELINES

In 1988, the Commission adopted a Statement of Decision in the *Open Meetings Act* test claim (CSM 4257). The Commission’s parameters and guidelines for the *Open Meetings Act* program authorized reimbursement for the increased costs to prepare and post a notice and an agenda containing a brief general description of each item of business to be transacted or discussed at least 72 hours before the meeting of the local legislative body. For purposes of seeking reimbursement for the *Open Meetings Act* program, “legislative body” was defined in former Government Code sections 54952 and 54952.2 to include the governing body of a local agency, permanent decision-making committees or boards created by formal action of the governing body, and temporary decision-making committees or boards created by formal action of the governing body.

In 2001, the Commission adopted a Statement of Decision in the *Brown Act Reform* test claim (CSM 4469). The *Brown Act Reform* test claim addressed the 1993 and 1994 amendments to the Brown Act. The Commission found that the test claim legislation constituted a reimbursable state-mandated program by:

- Adding two new “legislative bodies” required to comply with the provisions of the Brown Act;
- Requiring certain advisory bodies to comply with the full notice and agenda requirements of the Brown Act by preparing and posting, at least 72 hours before the meeting, a notice and agenda that contained a brief general description, generally not to exceed 20 words, of each item of business to be transacted or discussed at the meeting of the advisory body; and

- Requiring all legislative bodies defined in the Brown Act to comply with public disclosure and reporting requirements for closed session meetings.

In 2002, the Commission adopted the parameters and guidelines for *Brown Act Reform*, with a reimbursement period beginning January 1, 1994. The parameters and guidelines were consolidated with the parameters and guidelines for the *Open Meetings Act* program (CSM 4257) for annual reimbursement claims filed for the 2001-2002 fiscal year and thereafter.

Assembly Bill 138

AB 138 became effective and operative on July 19, 2005, and does three things that are relevant to the parameters and guidelines for these programs. First, AB 138 amended Government Code section 17556, subdivision (f), to read as follows:

The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:

... (f) The statute or executive order imposes duties that are necessary to implement, reasonably within the scope of, or expressly included in a ballot measure approved by the voters in a statewide or local election. This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters....

Second, AB 138 repealed and replaced two statutes within the Brown Act, Government Code sections 54954.2 and 54957.1, and added language that the statutes are necessary to implement and are reasonably within the scope of Proposition 59. As more fully discussed below, Proposition 59 was enacted by the voters in the November 2004 election to amend the Constitution to require that meetings of public bodies be open to the public. Section 16 of AB 138 states the following:

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Third, AB 138 requires the Commission to “amend the appropriate parameters and guidelines” for the *Open Meetings Act* and *Brown Act Reform* programs “to be consistent” with this bill. Section 17 of AB 138 states the following:

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Commission Findings

Article XIII B, section 6 of the California Constitution requires reimbursement only when the Legislature or any state agency mandates a new program or higher level of service that results in increased costs mandated by the state. Reimbursement under the Constitution is not required when duties are imposed by the voters. In addition, Government Code section 17556, subdivision (f), as amended by AB 138, prohibits the Commission from finding “costs mandated by the state” when:

The statute or executive order imposes duties that are *necessary to implement, reasonably within the scope of*, or expressly included in the ballot measure approved by the voters in a statewide or local election. *This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.* (Emphasis added.)

Thus, reimbursement is not required under Government Code section 17556, subdivision (f), when a test claim statute imposes duties that are necessary to implement, are reasonably within the scope of, or are expressly included in a ballot measure approved by the voters either before or after the enactment of the test claim statute. Government Code section 17556, subdivision (f), as amended by AB 138, is a duly enacted statute and must be presumed constitutionally valid.¹

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(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

(3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

¹ *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 129.

(4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provision in Section 7.

(5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.

(6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses provided in Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions; nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses.

The ballot materials given to the electorate on Proposition 59 state that: “The measure does not directly require any specific information to be made available to the public. It does, however, create a constitutional right for the public to access government information.”² Thus, the test claim statutes in the *Open Meetings Act* and *Brown Act Reform* programs do not impose duties that are “expressly included” in the ballot measure. Nevertheless, the Commission finds that the exception to reimbursement found in Government Code section 17556, subdivision (f), applies since the test claim statutes are “necessary to implement” and are “reasonably within the scope of” Proposition 59.

The purpose of Proposition 59 is expressly stated as follows: “The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.” (Cal. Const., art. 1, § 3, subd. (b)(1).) To implement the voter’s intent, Proposition 59 acknowledges the existing open meetings statutes and requires that the existing statutes be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access. (Cal. Const., art. 1, § 3, subd. (b)(2).) The Brown Act is specifically identified in the ballot materials provided to the voters as existing law governing the open meetings for local legislative bodies.³

The purpose of the Brown Act, as declared by the Legislature in 1953, is similar to the purpose of Proposition 59. Government Code section 54950 provides that:

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³ *Id.*

In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

The test claim statutes further this purpose by requiring the following activities that are listed in the parameters and guidelines:

- Prepare a single agenda for a regular meeting of a legislative body of a local agency or school district containing a brief description of each item of business to be transacted or discussed at a regular meeting, including items to be discussed in closed session, and citing the time and location of the regular meeting. (Gov. Code, § 54954.2.)
- Post a single agenda 72 hours before a meeting in a location freely accessible to the public. Further, every agenda must state that there is an opportunity for members of the public to comment on matters that are within the subject matter jurisdiction of the legislative body, subject to exceptions stated therein. (Gov. Code, §§ 54954.2, 54954.3.)
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- Reconvene in open session prior to adjournment to make any disclosures required by Government Code Section 54957.1 of action taken in the closed session. (Gov. Code, §§ 54957.1, 54957.7.)

Since the purpose of the Brown Act and the purpose of Proposition 59 are to ensure that the people have the right of access to information concerning the conduct of the people's business, the Commission finds that the activities identified in the parameters and guidelines are necessary to implement and are reasonably within the scope of Proposition 59. Moreover, the Legislature expressly declared, when enacting AB 138 in July 2005, that Government Code sections 54954.2 and 54957.1 "are necessary to implement and reasonably within the scope of paragraph (1) of subdivision (b) of Section 3 of Article I of the California Constitution." (AB 138, § 16.)

Therefore, the Commission finds that Government Code section 17556, subdivision (f), applies to the *Open Meetings Act* and *Brown Act Reform* programs and, thus, the activities listed in the parameters and guidelines are no longer reimbursable. AB 138 became operative and effective on July 19, 2005. Section 17 of the bill, when directing the Commission to set aside the *Open Meetings Act* and *Brown Act Reform* decisions, states that "the operative date of these actions shall be the effective date of this act."

Therefore, the Commission sets aside the consolidated parameters and guidelines for these programs, effective July 19, 2005.

PAULA HIGASHI, Executive Director

Date

Attachment: Consolidated Parameters and Guidelines